

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Extension of Section 272 Obligations Of)	
Southwestern Bell Telephone Co.)	WC Docket No. 02-112
In the State of Texas)	

COMMENTS

WorldCom, Inc. d/b/a MCI (MCI) hereby submits its comments on the Petition of AT&T Corp. (AT&T Petition), filed April 10, 2003 in the above-captioned proceeding.

I. The Commission Should Retain the SWBT-Texas Section 272 Safeguards

Given that the Commission has found that the section 272 safeguards are necessary to guard against the risks to interLATA competition and to consumers when the local market is not “fully competitive,”¹ the Commission should retain the section 272 safeguards for SWBT-Texas until the local market in Texas becomes fully competitive. Specifically, the Commission should, pursuant to its section 272(f)(1) authority, retain the section 272 safeguards as long as SWBT remains classified as a dominant carrier in the provision of any interstate services in Texas. As long as a BOC remains dominant, i.e., continues to possess market power, the section 272 safeguards remain necessary to constrain the BOC’s ability to discriminate against its rivals in the

¹ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, released December 24, 1996 (Non-Accounting Safeguards Order) at ¶¶ 9-10.

interLATA market and to engage in cost-shifting. For example, the section 272 safeguards act to constrain a BOC with market power from “degrad[ing] services and facilities furnished to its affiliate’s rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys.”²

Permitting the SWBT-Texas section 272 safeguards to expire while SWBT remains a dominant carrier would be inconsistent with the Commission’s twenty-year history of imposing separate affiliate requirements on dominant LEC participants in the interLATA market. Under rules first adopted in the 1984 Fifth Competitive Carrier Order, independent LECs must provide interexchange services through a separate affiliate in order to be treated as nondominant in the provision of interexchange services.³ Given that the Commission has found that the Competitive Carrier affiliate rules are necessary to deter dominant independent LECs from engaging in anticompetitive conduct, and given that the Commission has found that the independent LECs “are less likely to be able to engage in anticompetitive conduct than the BOCs,”⁴ the Commission should find that the stricter section 272 separate affiliate requirements remain necessary as long as SWBT remains a dominant carrier.

Not only does the Commission still classify SWBT as a dominant carrier with market power, but all marketplace evidence confirms that SWBT continues to have the ability to discriminate against its rivals and to misallocate costs. Most importantly, the evidence shows that competing long distance carriers remain dependent on SWBT

² Non-Accounting Safeguards Order at ¶ 11.

³ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984) (Fifth Competitive Carrier Order); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15756, 15849 (1997) (Interexchange Order).

facilities in order to reach their customers. First, the Commission's data show that SWBT continues to possess an overwhelming share of the Texas local market -- 84 percent of the access lines in Texas.⁵ And the most recent data show that CLEC market share in Texas is actually falling; as a recent Texas PUC study found, "the market share held by competitive providers . . . appears to have begun to level out or decline."⁶

Moreover, the vast majority of the access lines attributed to CLECs rely on SWBT facilities. Both Commission and Texas PUC data show that only about 20 percent of "CLEC" lines in Texas are served entirely over CLEC facilities.⁷ In other words, only about 3 percent of total access lines in Texas are served entirely over CLEC facilities.⁸ Allowing the section 272 safeguards to sunset under these circumstances would be inconsistent with the Commission's statement that section 272 safeguards would be retained "until facilities-based alternatives to the local exchange and exchange access services of the BOCs make those safeguards no longer necessary."⁹

Because SWBT's interLATA competitors remain dependent on SWBT's facilities to reach their customers, SWBT continues to have the ability to discriminate against those competitors. For example, SWBT's control over the PIC change process for the vast majority of residential and small business lines in Texas gives it the ability to discriminate against competitors in the residential and small business market.

Similarly, SWBT's control over the special access facilities that its rivals need to reach

⁴ Interexchange Order, 12 FCC Rcd at 15854.

⁵ December 2002 Local Competition Report, Table 6.

⁶ Public Utility Commission of Texas, "Scope of Competition in Telecommunications Markets of Texas," January 2003 (Texas PUC Scope Report), cover letter.

⁷ December 2002 Local Competition Report, Table 4; Texas PUC Scope Report at 21.

⁸ CLEC market share (16%) * Percent facilities based (20%) = 3.2%.

⁹ Non-Accounting Safeguards Order at ¶ 13 (emphasis added).

the vast majority of business customer locations gives it the ability to discriminate against competitors in the larger business market.

Allowing SWBT's section 272 requirements to sunset would open the floodgates to more-frequent and less-detectable exercises of SWBT's market power. First, if SWBT were permitted to provide both access and interLATA services on an integrated basis, it would be far more difficult to detect and deter discrimination in the provision of access circuits. By requiring the RBOCs' interexchange operations to use the same types of access facilities as competitors, and to procure those facilities in the same manner as competitors, the section 272(a) separate affiliate requirement facilitates comparison of the rates, terms, and conditions on which those facilities are provided. Furthermore, the separate affiliate requirement avoids the need to allocate costs between "local" and "interexchange" operations, thus reducing the risk of improper allocation of costs.¹⁰

Significantly, both the Texas PUC and the Texas Attorney General's office have recommended extension of SWBT's section 272 safeguards. The Texas PUC has stated that "SWBT's continued dominance over local exchange and exchange access services still hinders the development of a fully competitive market"¹¹ That dominance continues to give SWBT "both the incentive and ability to discriminate against competitors and to engage in anti-competitive behavior."¹² As a result, the Texas PUC "cannot represent that circumstances in Texas' markets warrant removal of competitive safeguards."¹³

¹⁰ Id. at ¶ 159.

¹¹ Comments of the Public Utility Commission of Texas (Texas PUC), WC Docket No. 02-112, July 25, 2002, at 3.

¹² Id.

¹³ Id.

The Commission should give considerable weight to the recommendations of the Texas PUC. As Commissioners Copps and Adelstein have explained, “[s]ince the State commissions . . . are [the Commission’s] partners in the effort to carry out the directives of Congress, it is particularly important to weigh their considerations, and particularly that of the affected State”¹⁴ Not only did Congress assign the states a significant role in the section 271 process, but the section 272 safeguards are equally applicable to both interstate and intrastate services.¹⁵ If a BOC were able to discriminate against its rivals, such discrimination would affect both interstate and intrastate interLATA competition. Similarly, any misallocated costs of providing interLATA services would flow through the separations process to both the interstate and intrastate rate bases.

II. The Commission Should Retain the Section 272 Safeguards Until Alternative Safeguards Are In Place

Allowing the SWBT-Texas section 272 safeguards to expire would be premature if only because the Commission has open proceedings that address precisely the issues raised by the pending expiration of the Texas section 272 safeguards. In particular, the Commission should retain the SWBT-Texas section 272 safeguards until it has determined, based on the record developed in response to last May’s Section 272 Sunset NPRM, “whether, and, if so, under what conditions, the structural and nondiscrimination safeguards established in section 272 should be extended by the Commission”¹⁶

¹⁴ Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, Memorandum Opinion and Order, WC Docket No. 02-112, released December 23, 2002 (Sunset Order), Joint Statement of Commissioner Jonathan S. Adelstein and Commissioner Michael J. Copps.

¹⁵ Non-Accounting Safeguards Order at ¶ 30.

¹⁶ Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, Notice of Proposed Rulemaking, WC Docket No. 02-112, released May 24, 2002, at ¶ 9, 23.

Certainly, the Commission should not permit the section 272 safeguards to sunset until it has determined whether alternative safeguards should be imposed instead. In the Section 272 Sunset NPRM, the Commission asked the public to comment on whether alternative safeguards should take the place of the section 272 safeguards, if the section 272 safeguards were permitted to sunset.¹⁷ More recently, the Commission announced that it plans to examine “what approach is appropriate for BOCs and independent LECs, if and when these carriers may provide in-region, interexchange services outside of a separate affiliate.”¹⁸ Commissioners Adelstein and Copps, in their Dissent from the December, 2002 Sunset Order, were concerned that by simply allowing the Verizon-New York section 272 safeguards to expire, “the Commission ha[d] neglected to consider whether there is a need for these or alternative safeguards.”¹⁹

At a minimum, the Commission should retain the SWBT-Texas section 272 safeguards until the Commission has put in place adequate measures to detect BOC violations of section 272(e)(1), which does not sunset. In 1996, the Commission adopted a Further Notice of Proposed Rulemaking that proposed a comprehensive reporting regime to detect violations of section 272(e)(1),²⁰ but that proceeding remains open. In 2001, the record from that proceeding was incorporated into the CC Docket No. 01-321 special access metrics proceeding,²¹ but that proceeding also remains open. Because the Commission has not adopted comprehensive performance reporting

¹⁷ Id.

¹⁸ Commission Meeting Agenda for May 15, 2003, released May 8, 2003.

¹⁹ Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, Memorandum Opinion and Order, WC Docket No. 02-112, released December 23, 2002 (Sunset Order), Joint Statement of Commissioner Jonathan S. Adelstein and Commissioner Michael J. Copps.

²⁰ Non-Accounting Safeguards Order at ¶¶ 362-382.

²¹ Performance Measurements and Standards for Interstate Special Access Services, CC Docket No. 01-321, Notice of Proposed Rulemaking, released November 19, 2001, at ¶ 5.

requirements to implement section 272(e)(1), the section 272(d) audit reports are the only source of data that permit the Commission and competitors to compare provisioning and repair intervals for access services provided by the BOCs to their long distance operations with the BOCs' performance when providing access services to unaffiliated carriers.²² If the audit requirement and other separate affiliate requirements were permitted to sunset, there would be no information available to ensure compliance with section 272(e)(1). Moreover, reporting requirements become even more important if the section 272 separate affiliate requirement is allowed to sunset; as the Commission has found, the risks of discriminatory provisioning are heightened if the BOC is permitted to provide interLATA services on an integrated basis.²³ Consequently, the Commission should not permit the SWBT-Texas section 272 safeguards to sunset before the Commission has adopted reporting requirements sufficient to implement section 272(e)(1).

²² See, e.g., CC Docket No. 96-150, Ernst & Young LLP, Section 272 Biennial Report for SBC Communications Inc., September 16, 2002, Attachment A-7.

²³ In the Non-Accounting Safeguards Order, the Commission found that "nondiscrimination safeguards would offer little protection if a BOC and its section 272 affiliate were permitted to own transmission and switching facilities jointly." Similarly, shared provisioning "would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." Non-Accounting Safeguards Order at ¶¶ 160, 163.

III. Conclusion

For the reasons stated herein, the Commission should extend the section 272 safeguards applicable to SWBT-Texas.

Respectfully submitted,
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